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No. 82-1756

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ODRIC BAKER, PETER G. LARSON, GORDON C. THAYER, FRANK THAYER, RICK ST. GERMAINE, BRUCE TAYLOR, and JAMES H. SCHLENDER, individually and as members of the Lac Courte Oreilles Tribal Governing Board,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF WISCONSIN IN OPPOSITION

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QUESTION PRESENTED

Did the 1854 Treaty with the Chippewa Indians divest the State of Wisconsin of its exclusive sovereignty over the use of its navigable waters by non-Indians?

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STATEMENT OF CASE

This case arises out of the efforts of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (Band) to regulate non-Indian hunting, fishing, trapping and ricing on navigable waters in and around the Lac Courte Oreilles Reservation. In its present posture, the case specifically involves the question whether the Band has the power to enforce its Conservation Code (Code) which

provides for licensing and setting seasons and bag limits for fishing, hunting and harvesting wild rice against persons who are not members of the Band but who utilize the navigable waters involved for such purposes.

The Band is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, ch. 216, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*, with a governing body recognized by the Secretary of the Interior. The Band occupies the Lac Courte Oreilles Indian Reservation in northern Wisconsin, created pursuant to the Treaty of 1854, 10 Stat. 1109 (Pet. App. 92). The 1854 Treaty between the United States and the Chippewa Indians reserved "for the use of" the Band a tract of land "equal in extent to three townships." (Pet. App. 94, para. 3d.)

The Band enacted its Code on May 24, 1976. This litigation began on May 27, 1976, with an action brought by the State of Wisconsin against the members of the Band's tribal governing board seeking declaratory and injunctive relief to prohibit enforcement of the Code against non-Indians within the Lac Courte Oreilles Indian Reservation. The complaint was filed in the State Circuit Court for Sawyer County, Wisconsin, but was removed to federal district court on petitioners' petition pursuant to 28 U.S.C. §§ 1441(b), 1446. Jurisdiction in the federal district court was based on 28 U.S.C. § 1331a.

The district court granted the state's motion for preliminary injunctive relief on July 9, 1976 (Pet. App. 31). The court scheduled a trial on the factual issues relating to the Band's claim of authority to regulate nonmembers, which trial was held on December 14 and 15, 1978. The evidence at trial focused on (1) whether the Band acquired the exclusive right to hunt, fish and gather wild rice under the 1854 Treaty on the navigable waters at issue and (2) whether such navigable waters are within the Lac Courte Oreilles Reservation as established pursuant to Article 2 of that Treaty.

The district court issued its final decision on October 23, 1981. 524 F. Supp. 726 (W.D. Wis. 1981) (Pet. App. 69). The court concluded that the waters at issue were within the reservation, but that the facts determined at trial were legally insufficient to reserve exclusive harvesting rights to the Indians, citing the analysis and holding in *Montana v. United States*, 450 U.S. 544 (1981). Accordingly, the court entered judgment enjoining petitioners from enforcing the Band's Code against nonmembers.

Petitioners appealed from the entire judgment and the state cross-appealed on the boundary question and certain other factual determinations. (Finding Nos. 86-89, 524 F. Supp. at 732-34.) The Court of Appeals affirmed the district court but held that it was not necessary to determine whether the reservation's boundaries include any navigable waters, and vacated the lower court's findings in this regard.

ARGUMENT

The Court of Appeals' ruling is correct and does not conflict with the decision of any other circuit, or with any precedent of this Court. Moreover, the issues resolved turn on the special history of a single Indian reservation and present no question of general importance requiring this Court's intervention. Since none of the traditional standards for granting certiorari have been met, this Court should withhold its writ.

The central issue is whether the State of Wisconsin was divested of its sovereignty over non-Indians utilizing state navigable waters as a result of the 1854 Treaty which authorized the establishment of a reservation "for the use of" the Band.

Wisconsin attained statehood on May 2, 1848, six years before the Band's reservation was authorized by the 1854 Treaty, and twenty-five years before the reservation was finally established in 1873. For a complete history of the establishment of the Lac Courte Oreilles Reservation see plaintiff's exhibit no. 11 (R. 30-31), which is the complete opinion and findings of fact of the Court of Claims in *Mole Lake Bank v. United States*, 139 F.Supp.938 (1956), 134 Ct.Cl.478 (1956), *cert. denied*, 352 U.S. 892 (1956) *(see* especially Finding Nos. 9, 11, 13-21, 23-24, 27, 31, 34-36).

The Treaty is silent on the Band's hunting and fishing rights. The state conceded in the courts below that the Band acquired the same hunting and fishing rights that the Red Cliff and Bad River Bands (also parties to the 1854 Treaty) acquired in waters adjacent to their reservations as determined in *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972).

There is, however, nothing in the 1854 Treaty that would even arguably suggest that the parties intended to divest the state of its exclusive sovereignty over non-Indians utilizing the state's navigable waters for purposes of hunting, fishing and related activities.

The power to regulate fishing and hunting in navigable lakes is one of the powers reserved to the states under the Constitution. *Montana*, 450 U.S. at 551-52. *Montana* makes clear that abrogation of state sovereign powers by treaty will not be lightly inferred but rather will require some explicit showing to indicate that such was the intention of the federal government when it entered into the treaty. The *Montana* Court was not purporting to announce new principles in this regard. The prevailing opinion merely applies the rule of earlier cases such as *United States v. Holt State Bank*, 270 U.S. 49 (1926), with regard to state sovereignty over its navigable waters.

In sum, there has been no departure from the controlling principles and the decision below should be left undisturbed. This Court has sufficient burdens without undertaking reexamination of long-settled cases upholding exclusive state sovereignty over its non-Indian citizens and their use of its navigable waters. In these circumstances, it is extraordinary to ask this Court to intervene.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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